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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 44557
Plaintiff-Respondent,)	
)	Bannock County Case No.
v.)	CR-2014-2025
)	
MICHAEL A. FRANGESH,)	
)	RESPONDENT'S BRIEF
Defendant-Appellant.)	
_____)	

Issue

Has Frangesh failed to establish that the district court abused its discretion, either by imposing concurrent, unified sentences of 15 years, with six years fixed, upon his guilty pleas to three counts of aggravated DUI, or by denying his Rule 35 motion for reduction of his sentences?

Frangesh Has Failed To Establish That The District Court Abused Its Sentencing Discretion

On January 27, 2014, Frangesh, while driving with a BAC of 0.264, crossed the center line of Hilene Road and collided with a vehicle that was occupied by three young girls. (PSI, pp.5-6, 23.) All of the girls had to be extricated from their vehicle and they all sustained serious

injuries as a result of the crash. (PSI, pp.5-6 (four days after incident, investigating officer learned that one of the victims “had a broken wrist that would probably require surgery,” another “was recovering from surgery for a broken pelvis,” and another was “coming out of a medical induced coma and could have long term brain damage due to the crash”).)

The state charged Frangesh with three counts of aggravated DUI. (R., pp.64-66.) Pursuant to a plea agreement, Frangesh pled guilty to all three counts, and the state agreed to recommend concurrent sentences and to not pursue a persistent violator enhancement. (R., p.88; Tr., p.8, L.10 – p.9, L.4.) The district court accepted Frangesh’s pleas and imposed concurrent, unified sentences of 15 years, with six years fixed. (R., pp.107-13.) Frangesh filed a timely Rule 35 motion for reduction of his sentences, which the district court denied. (R., pp.114-15, 135-36.) Frangesh attempted to appeal from the judgment and from an order denying his motion for reconsideration of the denial of his Rule 35 motion, but both appeals were dismissed. (R., pp.120-23, 137-38, 145-51, 166.) Following a post-conviction action, Frangesh’s appellate rights were restored, and Frangesh filed a timely, albeit premature, appeal from the reentered judgment. (R., pp.167-70; 7/24/17 Order To Withdraw Conditional Dismissal And Reinstate Appeal.)

Frangesh asserts his sentence for three counts of aggravated DUI is excessive in light of his employment history, alcohol abuse issues, support network, purported remorse, and acceptance of responsibility. (Appellant’s brief, pp.3-5.) The record supports the sentence imposed.

When evaluating whether a sentence is excessive, the court considers the entire length of the sentence under an abuse of discretion standard. State v. McIntosh, 160 Idaho 1, 8, 368 P.3d 621, 628 (2016); State v. Stevens, 146 Idaho 139, 148, 191 P.3d 217, 226 (2008). It is presumed

that the fixed portion of the sentence will be the defendant's probable term of confinement. State v. Oliver, 144 Idaho 722, 726, 170 P.3d 687, 391 (2007). Where a sentence is within statutory limits, the appellant bears the burden of demonstrating that it is a clear abuse of discretion. McIntosh, 160 Idaho at 8, 368 P.3d at 628 (citations omitted). To carry this burden the appellant must show the sentence is excessive under any reasonable view of the facts. Id. A sentence is reasonable if it appears necessary to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation, or retribution. Id. “In deference to the trial judge, this Court will not substitute its view of a reasonable sentence where reasonable minds might differ.” Id. (quoting Stevens, 146 Idaho at 148-49, 191 P.3d at 226-27). Furthermore, “[a] sentence fixed within the limits prescribed by the statute will ordinarily not be considered an abuse of discretion by the trial court.” Id. (quoting State v. Nice, 103 Idaho 89, 90, 645 P.2d 323, 324 (1982)).

The maximum prison sentence for aggravated DUI is 15 years. I.C. § 18-8006(1). The district court imposed concurrent, unified sentences of 15 years, with six years fixed, which falls within the statutory guidelines. (R., pp.107-13.) On appeal, Frangesh contends that his sentence is excessive in light of his support network, his ability to maintain employment, and his struggles with maintaining sobriety. (Appellant’s brief, pp.4-5.) None of these considerations demonstrate an abuse of discretion. Frangesh had much of the same support before he committed the instant offense, and it did not prevent him from being charged with a DUI three weeks before he committed the aggravated DUIs of which he was convicted in this case, from committing the instant offense itself, or from operating a vehicle without the owner’s consent less than two weeks after he committed the instant offense. (PSI, pp.12-14.) Likewise, neither Frangesh’s “30 years[’] experience in commercial fishing” nor his 10-month stint as a self-

employed handyman deterred or prevented him from continued criminal offending. (PSI, p.17.) Finally, while Frangesh's relapse may be explained by his inability to deal with domestic issues without consuming alcohol (see, PSI, pp.5-6), his justifications for his relapse do not excuse his subsequent decision to *drive* with an alcohol concentration more than three times the legal limit and, as a result, severely injure three young women (see PSI, pp.5-6, 23).

At sentencing, the district court articulated the correct legal standards applicable to its decision and also set forth its reasons for imposing Frangesh's sentence. (10/23/14 Tr., p.58, L.13 – p.63, L.24.) The state submits that Frangesh has failed to establish an abuse of discretion, for reasons more fully set forth in the attached excerpt of the sentencing hearing transcript, which the state adopts as its argument on appeal. (Appendix A.)

Frangesh next asserts that the district court abused its discretion by denying his Rule 35 motion for reduction of his sentences. (Appellant's brief, pp.5-6.) If a sentence is within applicable statutory limits, a motion for reduction of sentence under Rule 35 is a plea for leniency, and this court reviews the denial of the motion for an abuse of discretion. State v. Huffman, 144 Idaho, 201, 203, 159 P.3d 838, 840 (2007). To prevail on appeal, Frangesh must "show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the Rule 35 motion." Id. Frangesh has failed to satisfy his burden.

Frangesh argues that his sentences should have been reduced in light of the letters of support and live testimony he presented in support of his Rule 35 motion. (Appellant's brief, pp.5-6; see also PSI, pp.52-53; Tr., p.65, L.23 – p.77, L.8.) None of the letters or testimony provided new information. The district court was aware, at the time of sentencing, that Frangesh had a son, had a support network, was taking care of his ailing father, and was having issues with

his girlfriend. (See generally PSI.) The district court specifically considered the information Frangesh provided in conjunction with his request for leniency but found the information was not new and did not militate against the reasonableness of Frangesh's sentences. The court stated, "Society need[s] to be protected, and I just don't feel that in spite of the comments here today, much of what I already knew about him and his life, that it makes the difference in that balance that I would reduce the sentence any more." (1/20/15 Tr. p.84, L.22 – p.85, L.2.) The state submits that by failing to establish his sentence was excessive as imposed and by failing to provide any new information, Frangesh has also failed to establish that the district court abused its discretion by denying his Rule 35 motion for a reduction of sentence.

Conclusion

The state respectfully requests this Court to affirm Frangesh's conviction and sentences and the district court's order denying Frangesh's Rule 35 motion for a reduction of sentences.

DATED this 25th day of August, 2017.

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

ALICIA HYMAS
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 25th day of August, 2017, served a true and correct copy of the attached RESPONDENT'S BRIEF by emailing an electronic copy to:

BRIAN R. DICKSON
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

APPENDIX A

1 circumstances of this case, recommendations from
2 the presentence investigator and the accompanying
3 documents and evaluations that went with it along
4 with the letter and certificate that Mr. Souza
5 provided me this morning. I have listened
6 carefully to the victims, and the victims' families
7 and comments of Mr. Godfrey and his recommendation.
8 I also listened carefully to Mr. Souza's comments and
9 recommendations with regard to sentencing also,
10 and, of course, listened to you this morning and
11 your apology to the family with regard to your
12 conduct in this particular case.

13 In determining appropriate sentence in
14 this particular case you know that Mr. Souza, I'm
15 sure, has explained to you that the Court has
16 to consider protection of society. I have to
17 consider punishment and deterrence and
18 rehabilitation. First and foremost, I have to
19 consider protection of society. Though, I also
20 have to look at Idaho Code 19-2521 to determine
21 whether or not you would be a viable candidate
22 for probation or incarceration would be more
23 appropriate for you.

24 So considering all of those things,
25 the Court reviews this particular case and makes

1 the following comment for you; okay. With regard
2 to sentencing, the GAIN evaluation that was
3 performed on you did make a recommendation for
4 inpatient treatment. I'm concerned with regard
5 to your need for correctional treatment because
6 of the request or the evaluation making it a
7 recommendation for inpatient treatment, that
8 correctional treatment would be appropriate.
9 Part of that conclusion that I have made is that
10 your past incarceration and treatment really
11 haven't stopped you from drinking and driving.
12 You, yourself, even thought that you should have
13 picked up the phone and talked to your sponsor or
14 picked up the phone and talked to someone to
15 come pick you up that particular day rather than
16 getting behind the wheel because, being an
17 alcoholic, we understand relapse, but that's not
18 criminal. What is criminal is when we get behind
19 the wheel of a vehicle and drive under the influence
20 and then, unfortunately, something like this
21 results.

22 Alcohol is going to be something you
23 have to deal with for the rest of your life, and
24 you have to deal with it each day. Each day is a
25 struggle, but each day when you go to bed, you can

1 say, I stayed sober today and this is why. You lost
2 sight of that. You probably got complacent in your
3 recovery and you felt like, well, this is an excuse
4 for drinking. Probably if you thought about it
5 now for awhile, you had been planning that relapse
6 for some time. You knew it was coming. It was
7 just a matter of time when it was going to occur.
8 I have to consider whether or not a lesser sentence
9 would deprecate the seriousness of the crime in
10 this particular case, and, like I said, first
11 and foremost, I have to protect society from
12 your criminal behavior.

13 You put three people's lives at risk and
14 seriously injured them due to the behaviors, and it's
15 funny how it's just not their lives you affected.
16 You affected their family's lives, and your conduct
17 and your choices also affected your life and the
18 people that love you because there are people
19 out there that care for you and are concerned for
20 you and want the very best for you, and those
21 choices impacted their ability to be able to be
22 close to you and be a part of your life.

23 I also have to consider whether or not
24 imprisonment would provide the appropriate punishment
25 and deterrence for your conduct. I am concerned

1 in the fact that past incarcerations and treatment
2 you continued with the criminal thinking, I can
3 get behind the wheel of a vehicle after I drink.
4 It's okay. I'm not drunk. I'm not -- I'm going to
5 do those sorts of things.

6 There has to come a time when I have to
7 punish you to deter you from that behavior and
8 hope to deter others from future behavior like
9 this, I deal with the DUI Drug Court and I'm the
10 Judge of that DUI Drug Court. I see folks all
11 the time coming in on felony DUIs who have made
12 poor choices and they receive the treatment and
13 they graduate from that program. There is no
14 guarantee that they're going to be successful, and
15 they can be just like you and they can make the
16 same choice that you did and pick up that drink and
17 get behind the wheel and injure or kill other
18 people.

19 This isn't your first felony. You have
20 been to prison before, and so that's something
21 else that has to weigh on my mind with regard to
22 this particular case.

23 So what the Court is going to do as far
24 as imposing a sentence -- again, you have forty-two
25 days in which to appeal it -- first of all, I have

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1 to impose a suspension of your driving privileges.
 2 This is going to be absolute suspension,
 3 Mr. Frangesh. I don't think -- if I could -- if I
 4 could -- if I have the legal ability -- if I had
 5 the statute behind me, I don't think I would ever
 6 allow you to get behind the wheel of a car again,
 7 because you can't be trusted. Society is not
 8 protected when you're behind the wheel of a
 9 vehicle, but what I can do is I can impose a
 10 suspension of your driving privileges for fifteen
 11 years, five years for each count, and they're
 12 consecutive, and they will begin once you're
 13 released from incarceration.

14 It will make an incredible impact on
 15 your life when you get out of prison because
 16 you're not going to be able to drive. You have
 17 to rely on others or public transportation. I'm
 18 also going to impose a requirement that you
 19 reimburse the county \$750 for partial costs of
 20 your attorney. A \$500 fine on each count, plus
 21 court costs on each count.

22 Restitution, we have already discussed
 23 with regard to that, we'll put it off for six
 24 months and we'll see where we're at with
 25 that. Hopefully, Mr. Souza and Mr. Godfrey

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1 to supervise any restitution or fines or fees
 2 that have been ordered in this case as far as
 3 repayment.

4 Mr. Godfrey, anything else from you,
 5 sir?

6 MR. GODFREY: No, Your Honor.

7 THE COURT: Mr. Souza, anything else?

8 MR. SOUZA: Not at this time, Your Honor.

9 THE COURT: All right. Mr. Frangesh, good
 10 luck to you. I wish you the very best.

11 Folks, thank you so much for being here
 12 today. Appreciate your comments. It helped a lot
 13 to hear from all of you.

14 All right. We'll be in recess.
 15
 16
 17
 18 (CONCLUSION OF PROCEEDINGS HELD 10/23/2014.)
 19
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 21
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1 will be able to provide me with more information
 2 in six months.

3 The underlying sentence though, sir,
 4 is going to be six years fixed, nine years
 5 indeterminate on each count. I will run those
 6 sentences concurrently and give you credit
 7 for 257 days since your incarceration on
 8 February 9th, so that will be credited against
 9 that fixed period of six years of incarceration.
 10 That incarceration is to serve as a punishment
 11 to you and to protect society from you.

12 Will it deter you? Will it deter
 13 others? I hope it does. I don't know if there is
 14 ever any guarantee, but at least I know for the
 15 next nearly six years, society will be protected
 16 from your conduct. I hope you do well. I hope
 17 you learn something from all of this and you
 18 can move on with your life, because Mr. Souza
 19 is right, you will eventually get out. I fully
 20 suspect that you will complete the six years and
 21 will be paroled and you'll have an opportunity
 22 to be on parole, but making the choices that
 23 you did will get you right back in the state
 24 penitentiary.

25 I simply would ask the Parole Board